

IN THE WAITANGI TRIBUNAL

Wai 2541

CONCERNING

the Treaty of Waitangi Act 1975

AND

an application for an urgent hearing by Karina Williams, Ngaire Williams, Richard Marumaru, Patricia Henare, Vivienne Kopua, Barbara Lloyd, Raymond Rapana, Rangi Bristol, Matiu Haitana, Petuere Kiwara, Chirs Ngataierua, Buddy Taiaroa, Sonny Taiaroa, Adam Haitana, Henry Haitana, Dean Hiroti, Marilyn Mako, Rosita Dixon, Garth Hiroti and Kahukura Taiaroa

DECISION
ON APPLICATION FOR AN URGENT HEARING

29 February 2016

Introduction

1. This decision concerns an application for an urgent hearing concerning the Crown's recognition of the draft mandate strategy of the Uenuku Charitable Trust (UCT).

The claim

2. The Wai 2541 claim has been filed by a number of members of the Central Whanganui Claimant Community. The Central Whanganui Claimant Community (central Whanganui claimants) was one of four Large Natural Groupings recognised by the Crown in the Whanganui area. The others were Ngāti Rangi and groups based in the southern and northern parts of the Whanganui district.
3. The applicants submit that the Crown has failed in its duty to act reasonably and in good faith in its decision to recognise the draft mandate strategy of UCT; that they have failed to protect the interests of the central Whanganui claimants by recognising a mandate strategy which is deficient in many areas, unworkable and not representative of the claimant community. Further it is alleged that the Crown has failed to consult with the applicants prior to including their claim numbers within the mandate strategy and in relation to overlapping interests.
4. It is alleged that the applicants will suffer significant and irreversible prejudice as a result of the following Crown actions:
 - a) Fast-Tracking the mandate process for the UCT in order to install an entity with a Crown recognised mandate to progress the Tongariro National Park Settlement;
 - b) Negotiating a Deed of Settlement with the Tuwharetoa Hapū Forum and consulting exclusively with the UCT as to overlapping claim issues of central Whanganui claimants; and
 - c) Negotiating an Agreement in Principle with the Ngāti Rangi Trust and consulting exclusively with the UCT as to overlapping claim issues.

Background

5. In June 2013 the Crown recognised four Large Natural Groups within Whanganui Iwi for settlement purposes; one of these is the central Whanganui claimants. The UCT was established in early 2014, for the purpose of seeking a mandate to represent the central Whanganui claimants in settlement negotiations with the Crown.
6. The UCT provided a draft mandate strategy to the Crown in July 2014; the Crown considered that the UCT was well placed to undertake the mandating process in central Whanganui. Between October and December 2014 Crown officials worked with the UCT to develop the mandate strategy.
7. On 13 December 2014 the draft mandate strategy was released for public submissions. All Wai claimants had been notified of the draft mandate strategy on 12 December 2014 by letter from Crown officials. Submissions closed on 31 January 2015, the Office of Treaty Settlements (OTS) received over 40 submissions.
8. Crown officials met with submitters and members of the claimant community in February 2015 and again in April 2015. The mandate strategy was endorsed in June 2015.

9. A round of mandate hui were held across the country during June/July 2015. The mandate vote was managed by Electionz.com and was held by postal ballot, internet ballot and through ballot box at the hui. Voting closed on 31 July 2015, 82% of those who voted did so in favour of the mandate strategy.
10. UCT have prepared a draft Deed of Mandate and Crown officials have been working with UCT to develop this. Crown officials have not yet recommended recognition of the mandate of UCT to the Minister of Treaty of Waitangi Negotiations; the Crown advised that this will only occur once issues raised in submissions on the draft Deed of Mandate are addressed by UCT to the satisfaction of the Crown. Crown officials anticipated that the draft Deed of Mandate would be advertised before the end of 2015.

Procedural History

11. The statement of claim and application for urgency were filed on 14 September 2015 along with submissions in support from applicant counsel. The claim was registered on 15 September 2015 and the applicants were directed to file further submissions addressing the Tribunal's urgency criteria. Further submissions were filed on 21 September 2015.
12. On 22 September 2015 the Crown were directed to file submissions and evidence in response by 6 October 2015. Submissions and evidence in response were filed on 9 October 2015 by the Crown. The Tribunal also received submissions in response to the application from the Ngāti Rangī Trust.
13. The applicants were then directed to file any submissions and evidence in reply by 23 October 2015. After being granted an extension, the applicants filed submissions and evidence in reply on 2 November 2015. Further documents were received from the applicants on 3 November, 12 November and 17 November 2015.

Parties Submissions

Applicant's Submissions

14. The applicants allege that the Crown has failed to act honourably and reasonably by working closely with the UCT to the exclusion of other groups representing central Whanganui claimants, there were several groups seeking to develop a relationship with the Crown regarding settlement of claims but the Crown chose to work solely with the UCT. The applicants refer to documents of meetings which show that OTS decided early in the consultation process that it would be the UCT that would become the mandated representatives.
15. It is alleged by the applicants that the Crown dissuaded the UCT from setting up a common entity with representatives from other central Whanganui claimant groups. The applicants refer to an unnamed Crown official expressing the view that setting up a new entity would be a distraction from progress and would take more time.
16. The applicants allege that this early mandating with the UCT does not benefit central Whanganui claimants as all four Whanganui LNG's are not at a point where issues of overlapping claims and boundaries within Whanganui can be finalised, it does however benefit the Crown, Ngāti Rangī Trust and parties to the Tongariro National Park Settlement, as those settlements can now move forward.

17. The applicants note that although the UCT does not yet have a mandate they have developed a close working relationship with the Ngāti Rangi Trust. The applicant's further note that the OTS Red Book says that there is an obligation on the Crown to consult with all groups affected by overlapping claims issues but the applicant's allege that in the negotiation process with Ngāti Rangi there has been no consultation with other central Whanganui claimant groups.
18. It is further alleged by the applicants that there are various procedural deficiencies in the draft mandate strategy. These deficiencies include:
 - a) Hapū Governance – of the 38 trustee positions in the UCT, 26 seats are for hapū representatives however most of these hapū have been extinct since the 1880s;
 - b) UCT decision making – there is no executive established under the UCT rules and decisions are made by consensus of the 38 trustees; it is alleged that this model is unworkable;
 - c) Validity of Trust Deed – the UCT Trust Deed as displayed on the Charitable Trusts register appears to be invalid in terms of section 9 of the Property Law Act 2007 as it is undated and improperly signed/witnessed;
 - d) Trustee election process – this process is set out in detail in the UCT representation protocol but according to one of the applicants the process is not followed at all;
 - e) Marae – a large number of marae are included in the mandate strategy, including those of Ngāti Rangi,. It is alleged that the inclusion of marae which only have a slight connection with central Whanganui is a challenge to the identity of the rangatira of central Whanganui claimants;
 - f) Agreed Historical Account – there is a concern that the version of history that the Crown and the UCT and the Ngāti Rangi Trust have developed will create a new history for central Whanganui claimants by conflating the genuine histories already recorded; and
 - g) Claims – it is alleged that most of the claims listed in the mandate strategy do not support the UCT.
19. The UCT do not yet have a mandate, it alleged that despite this, the Crown is using them to facilitate the Crown settlements with Ngāti Rangi, Ngāti Tuwharetoa and in the Tongariro National Park settlement. The applicants submit that the Crown has an obligation to protect the interests of all groups with overlapping interests, whether mandated or not. The applicants submit that this requires consultation with all central Whanganui claimant groups not just the UCT.

Crown Response

20. The Crown opposes the application for an urgent hearing as the grounds for urgency have not been made out. It is submitted that the applicant's complaints, at their core, represent an internal dispute as to who the appropriate representatives are for central Whanganui claimants.
21. The decision whether to recognise the UCT mandate or not has not yet been made, therefore a Tribunal inquiry at this stage would be premature. The mandating process continues to allow all central Whanganui claimants to participate in the process and to provide input and make submissions on whether it should be approved. Should the mandate be approved, the applicants will have the opportunity to engage in negotiations through the UCT and vote on any Deed of Settlement.

22. In response to the applicants' assertions that the process has been rushed, the Crown submits that the process for recognising the UCT to date has been robust, transparent and in accordance with established Crown policy. The Crown has a limited role in the mandating process. The Crown considers that it is for the claimant group to decide who will represent them and despite this position the Crown will scrutinise the process to ensure that it has been fair and transparent. It also scrutinises the outcome of the mandating process. Assertions made by the applicants have no foundation and the results of the vote demonstrate support for the UCT.
23. The applicants' views have been heard throughout the mandate process and will continue to be taken into account; the Crown has met with the applicants and advised them that the Crown is not rushing to mandate central Whanganui. Further to this the Crown submits that as has been recognised by the Tribunal, Tribunal claimants do not hold a veto in the settlement process, the will of individual claimants will not be determinative, provided they have been consulted regarding the negotiation and settlement of their claims.
24. The Crown submits, in response to allegations concerning deficiencies in the draft mandate strategy, that they are either insufficient to raise significant and irreversible prejudice or they are matters in which the applicants have alternative remedies.
25. In response to allegations concerning overlapping claims processes, the Crown submits that these reflect a misunderstanding of the processes undertaken. The Crown's usual approach to overlapping claims is to encourage claimant groups to discuss their interests with neighbouring groups at an early stage but before final redress is agreed the Crown must be satisfied that issues have been resolved. It is submitted by the Crown that this process has not yet taken place and it is not imminent.
26. It is noted by the Crown that, as confirmed in the Court of Appeal an ability to demonstrate support is highly relevant when considering urgency. The Crown submits that it is unclear as to the individual claimants who support this application and that in any event no evidence has been put forward by the applicants as to the extent of their support and it is understood that the applicants do not have the support of the central Whanganui claimants. There is evidence to suggest that there is a sufficient body of support, 82%, for the UCT to proceed to settlement on behalf of central Whanganui claimants.

Ngāti Rangī Trust Submissions

27. Counsel for the Ngāti Rangī Trust submitted that throughout the application for urgency and supporting materials, the applicants and their counsel refer to and discuss Ngāti Rangī Trust and its negotiations inaccurately.
28. The Trust's position is as follows:
 - a) There is no current or pending Crown action in respect of Ngāti Rangī settlement negotiations that risks significant and irreversible prejudice to the applicants;
 - b) Settlement negotiations between the Trust and the Crown are at an early stage;
 - c) No specific items of redress have yet been offered by the Crown;
 - d) The statement of claim, submissions and the application contain a number of inaccuracies about Ngāti Rangī, the Trust and the settlement negotiations with the Crown.
29. In relation to overlapping claims, this is one of the points addressed in Terms of Negotiation signed with the Crown and they state that overlapping claims must be

addressed to the Crown's satisfaction before the Deed of Settlement is initialled. Since February 2015 negotiations have largely focussed on setting out and explaining Ngāti Rangi aspirations for settlements. No specific items of redress have yet been offered; as such the Trust is not yet at a point where there are specific items of redress to be discussed with neighbouring iwi.

30. It is submitted that discussions with the UCT have been in direct response to the UCT draft mandate strategy, including the area of interest overlapping with the Ngāti Rangi rohe and opposition to the list of marae set out in the mandate strategy.
31. The Ngāti Rangi Trust and Ngāti Rangi are hopeful that an entity will obtain a robust mandate to speak for central Whanganui claimants; however it is vitally important that this is achieved in a Treaty compliant manner.

Applicant Reply

32. In reply to the submission that the application is premature the applicants submit that it is not and their submissions point to the Crown plainly being in some haste to move the process forward, contrary to the Crown's submission that the process has not been rushed.
33. The applicants submit in reply, that the Crown has not provided evidence that the mandate process has been robust and transparent or that the deficiencies in the mandate have no foundation.
34. In reply to Crown's submissions the applicants submit that their core allegations are:
 - a) That the mandate process is not robust and transparent, that the Crown has failed to respect the rangatiratanga of the central Whanganui claimants by not allowing them to choose its own representatives and that the Crown has pre-determined approval of the UCT mandate;
 - b) That the outcome of the process, the mandated entity, has a structure which is not representative of central Whanganui claimants, which is prejudicial to them and the rangatiratanga of the applicants; and
 - c) That the mandate process for the UCT is being rushed to legitimise the UCT being the sole central Whanganui group consulted on overlapping claim issues in the Ngāti Rangi Settlement, and to install a mandated representative for Uenuku so the Tongariro National Park Settlement can proceed.
35. In reply to the Crown submission that the representative structure of UCT is a matter for the central Whanganui claimants and that the Tribunal should tread carefully, the applicants submit that as confirmed in the Ngāpuhi Mandate Report, the structure of the mandated entity is a legitimate subject for a Tribunal inquiry.
36. The Crown submitted that mandating was being undertaken for the benefit of central Whanganui claimants and not the benefit of other claimant groups, the applicants submit in reply that the issue is not whether to proceed to settlement but how to proceed to settlement and the current model means that the applicants and the groups that they represent will not participate in the settlement process.
37. In reply to the submission by the Ngāti Rangi Trust that negotiations between the Trust and the Crown are at an early stage, the applicants submit that this is less than accurate. Terms of Negotiation were signed eight months ago as formal negotiations began at that time.

Urgency Criteria

38. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

39. This is an application for urgency. Because that is all I am empowered to decide I must not stray into an assessment of the merits of the claim except where necessary. I should say at the outset that the application before me does not nearly reach the threshold for the grant of an urgent hearing.
40. There is a recent surge in the number of applications for urgent hearings. Many of them relate to mandating for settlement. Mandating issues may form the basis of a valid claim for breach of the principles of the Treaty and prejudice. The Tribunal has a clear duty to hear each claim. It must manage its business so that the right to a hearing is not rendered illusory by delay. Having said that I must have regard to others waiting in line for a hearing, some for decades. I must also have regard to the resources available to the Tribunal.
41. The Ngāpuhi Mandate Inquiry Report and its predecessors have given extensive guidance on urgency on mandating issues. They have shown the intricacy of Treaty negotiations and the fish hooks that can be found along the way to settlement. In this case settlement is not imminent and I cannot discern any imminent event that would imperil the claimants to the effect that they are suffering or likely to suffer, significant and irreversible prejudice. What I can discern is that the claimants do not like the way things are going and are apprehensive.
42. It is clear, perhaps trite, that the focus of the Tribunal must, as a matter of law, be upon the relationship between the Crown and the Claimants. The Tribunal cannot be drawn into inter-claimant politics and much less attempt to referee those disputes. The claim here is certainly couched as being against the Crown, but it seems clear that the kikokiko (meat), of the claim is a dispute as between claimant groups.

43. It is not necessary or appropriate that the Tribunal attempt to assess the inter claimant disputes complained of at this stage. It is far too early to be able to find, as the Ngāpuhi Mandate Tribunal did, that the structure of the UCT does not sufficiently protect hapū rangātīrangā. The political process should play out. The claimants can continue to be part of a continuing process. Certainly the UCT appears to have a robust support base and these claimants will have to continue to address that. The Crown does not appear to be attempting to lock groupings into the UCT structure against their will and the claimants can and perhaps should attempt to be part of the process as it goes forward.

44. The criteria for urgency are not present. The claim for urgency is dismissed.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel and those on the notification list for Wai 2541, the Uenuku Charitable Trust Mandate Strategy Claim.

DATED at Wellington this 29th day of February 2016

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by a long horizontal line that tapers off to the right.

Judge P J Savage
Deputy Chairperson

WAITANGI TRIBUNAL